

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

DIANE M. KAISER,

Charging Party,

v.

CALIFORNIA TEACHERS ASSOCIATION,

Respondent.

Case No. SF-CO-607-E

PERB Decision No. 1498

August 27, 2002

Appearances: Diane M. Kaiser, on her own behalf; Priscilla Winslow, Attorney, for California Teachers Association.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (Board) on appeal by Diane M. Kaiser (Kaiser) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the California Teachers Association (CTA) violated the Educational Employment Relations Act (EERA)¹ by breaching its duty of fair representation.

The Board has reviewed the entire record in this case including the original and amended unfair practice charge, the warning and dismissal letters, Kaiser's appeal and CTA's response to the appeal. The Board agent properly dismissed the charge on the basis that CTA is not the exclusive representative of the certificated bargaining unit in which Kaiser is included. The Board finds the dismissal letter to be free from prejudicial error and adopts it as the decision of the Board itself.

¹EERA is codified at Government Code section 3540 et seq.

ORDER

The unfair practice charge in Case No. SF-CO-607-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

Dismissal Letter

May 30, 2002

Diane M. Kaiser
4572 Gertrude Drive
Fremont, CA 94536

Re: Diane M. Kaiser v. California Teachers Association
Unfair Practice Charge No. SF-CO-607-E
DISMISSAL LETTER

Dear Ms. Kaiser:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 4, 2002. Your charge alleges that the California Teachers Association violated the Educational Employment Relations Act (EERA)¹ by breaching its duty of fair representation.

I indicated to you in my attached letter dated April 22, 2002, that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that unless you amended the charge to state a prima facie case or withdrew it prior to May 6, 2002, the charge would be dismissed. On May 4, 2002, you filed an amended unfair practice charge.

As amended, your charge makes following factual allegations. You are employed as a teacher by the Fremont Unified School District at Grimmer Elementary School. During the 2000-2001 school year, you were assigned to teach grade 3.

The District's curriculum included the Packard Grant/Open Court Language Arts Program. Teachers in certain grades were required to utilize this reading program. Maureen Smith, a teacher, was designated as the "Literacy Coach" for the Open Court reading program at Grimmer Elementary School. In or about early October 2000, Ms. Smith placed a memo in each teacher's mailbox requesting information on their progress through the reading program. When you did not respond to Ms. Smith's second memo, Principal Ed Tucker sent you a memo directing you to respond by October 6, 2000.

On October 27, 2000, you met with Mr. Tucker to discuss your evaluation goals for the 2000-2001 school year. During the meeting, Mr. Tucker threatened to assign you to a grade level which did not utilize the Packard Grant/Open Court Reading Program, if you did not fully

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

implement the reading program. On one occasion, Mr. Tucker observed you utilizing a publication that was not from Open Court. Mr. Tucker said he would be discussing the teachers' progress in the program with Ms. Smith.

In October 2000, you requested assistance from the Association. You informed the Association that Mr. Tucker was making excessive demands of you concerning the Open Court reading program. You also asserted that Mr. Tucker was violating the collective bargaining agreement by asking Ms. Smith to evaluate the performance of the teachers she visited in their classrooms.

The Association requested that the District provide information concerning the duties of the literacy coach and the information sought by the literacy coach.

On November 7, 2000, Bev Chernoff, District Coordinator of the Packard Grant/Open Court Language Arts Program, explained in a letter to Greg Bonaccorsi, President of the Fremont Unified District Teachers Association and Peg Tracey, Executive Director, that the Packard Foundation required schools to provide certain information to evaluate the Open Court reading program. She stated that the literacy coach was to assist teachers in achieving the goals of the grant program and collect information utilized by the Packard Foundation. The information collected by the literacy coach was not provided to the site principal, was not utilized for teacher evaluations and the literacy coach was not an evaluator.

On January 18, 2001, Mr. Tucker "fraudulently authored Teacher Comments on [your] first evaluation." The charge does not describe Mr. Tucker's comments or explain why they were fraudulent. There is no indication that your evaluation included comments concerning your progress in the Open Court reading program.

On March 14, 2001, you requested a "Level I Complaint Meeting" with Mr. Tucker. During the meeting, you raised concerns about Mr. Tucker's interference with your professional relationships with your students and their parents, your responsibility to evaluate your students, repeated interruption of your classroom lessons, infringing on your preparation periods and his unprofessional attitude toward you. Mr. Bonaccorsi attended the meeting as your union representative.

Mr. Tucker agreed to refrain from engaging in the above complaints. However, approximately two weeks later Mr. Tucker began engaging in the same conduct. You repeatedly notified Mr. Bonaccorsi of Mr. Tucker's conduct. You allege that Mr. Bonaccorsi and Ms. Tracey failed to correct the violations made by Mr. Tucker.

On March 30, 2001, Mr. Tucker made an impromptu 60 minute formal observation of your class. You allege that Mr. Tucker "seriously misrepresented the lesson observed in [your] second evaluation." The charge does not describe any misrepresentation in your evaluation.

On April 2, 2001, Mr. Tucker handed you a memo dated March 30, 2001 which stated that your grade level assignment for the 2001-2002 school year had been changed from grade 3 to

grade 4/5. The memo stated that the change was required because you had not been providing your students with the skills they needed for reading. Your charge alleges that Mr. Tucker had never observed you teaching the Open Court reading program.

You informed both the Association and Mr. Tucker that you did not agree with the assignment to teach grade 4/5.

You allege that Mr. Tucker sexually harassed you on numerous occasions. You notified the Association of Mr. Tucker's conduct. The District's sexual harassment policy states, in part:

Employees or other individuals who feel aggrieved because of conduct they believe constitutes sexual harassment should directly or through a representative inform the person engaging in such conduct that such conduct is offensive and must stop.

Mr. Bonaccorsi refused your request, as your representative, to inform Mr. Tucker to stop engaging in offensive conduct. However, Mr. Bonaccorsi told you that he had informed Beth Robinson, Assistant Superintendent, of Mr. Tucker's harassing behavior. Your charge alleges that you were forced to inform Mr. Tucker yourself to cease his offensive behavior. On April 2, 2001, you requested that Mr. Tucker cease his abusive behavior.

Ms. Tracey informed you that she had referred your sexual harassment complaint to an attorney. During your first conversation with attorney Margo Feinberg, Ms. Feinberg agreed to represent you. During a subsequent phone conversation with Ms. Feinberg, she told you that Mr. Bonaccorsi did not want her involved. Ms. Feinberg told you that you would have to provide your own representation of your sexual harassment claims.

On April 23, 2001, the Association filed a grievance on your behalf challenging your assignment to teach grade 4/5. You and Mr. Bonaccorsi attended a Level I grievance meeting with Mr. Tucker on May 18, 2001. At the meeting you provided Mr. Tucker with two evaluation forms which included your corrections. Mr. Tucker denied your Level I grievance on May 25, 2001.

You appealed your grievance to Level II before Cheryl Bushmire, Director of Certificated Personnel. Following knee surgery, Mr. Tucker was unavailable to participate in the Level II grievance meeting throughout the summer.

Article 6 of the CBA states, in pertinent part:

6.10 In the event a grievance is filed or unresolved on or after May 1 which, if left unresolved until the beginning of the following school year, could result in harm to a party in interest, the time limits set forth herein shall be reduced so that the grievance may be exhausted prior to the end of the school term.

By mutual agreement, the grievance procedure may be continued during the summer.

In early August 2001, you asked Mr. Bonaccorsi to schedule the Level II grievance at the end of August during the Teacher Work Days. Mr. Bonaccorsi agreed. During the third week of August, you left several telephone messages for Mr. Bonaccorsi concerning the grievance meeting. When Mr. Bonaccorsi failed to respond, on August 28, 2001, two days before Teacher Work Days were to begin, you sent a letter to Ms. Bushmire which stated in part:

Due to the delay in the Level II Grievance proceedings, as Ed Tucker, site administrator of Grimmer Elementary School, was unavailable throughout the summer, the difficulty of Greg Bonaccorsi and myself coordinating our communications due to vacations, meetings, etc., and the pending start of the 2001-2002 school year, I am submitting this memo to you.

You requested that Ms. Bushmire maintain your grade 3 teaching assignment until your grievance was resolved.

You allege that Ms. Bushmire ignored your request and failed to timely schedule a Level II grievance meeting prior to the start of the 2001-2002 school year. You also allege that the Association breached its duty of fair representation by failing to timely schedule the Level II grievance meeting.

You reported for work at the beginning of the 2001-2002 school year. You were absent from work September 6, 2001 to April 1, 2002, due to illness or injury.

On December 6, 2001, you contacted CTA President Wayne Johnson requesting the assignment of another union representative to assist you. Mr. Johnson responded in a letter dated December 11, 2001, stating that Beverly Tucker, CTA Chief Legal Counsel, and Jeannette Logue, CTA Assistant Executive Director, would investigate your concerns.

You sent several letters to CTA before Ms. Logue contacted you in mid-January 2002. Ms. Logue told you she was too busy to schedule a meeting with you and she spent approximately 15 minutes on the phone with you discussing your concerns. Ms. Logue said that she probably would not assign another representative.

On January 25, 2002, you sent a letter to Ms. Logue summarizing your telephone conversation.

On February 20, 2002, Ms. Tucker sent you a letter indicating that CTA had completed its investigation of your concerns. Ms. Tucker stated that CTA concluded that the Association staff and officers had made every effort to represent you and that you had failed to cooperate

with Ms. Tracey and Mr. Bonaccorsi. Ms. Tucker informed you that CTA would not assign you another representative.

You state that the CBA provides that a unit member has a right to representative of his or her choice. You contend that CTA breached this provision when it failed to provide you with a representative of your choice. You also assert that CTA owes you a duty of fair representation because the CBA describes the Association, the exclusive representative of the certificated bargaining unit, as FUDTA/CTA/NEA.

As I explained in the attached letter, the Fremont Unified District Teacher's Association is the exclusive representative of the members of the certificated bargaining unit. The Association has a duty to fairly represent all members of the bargaining unit. Although not required to, in many cases local unions choose to affiliate with other organizations such as CTA. However, since CTA is not the exclusive representative, it does not owe a duty of fair representation to bargaining unit members. (California Teachers Association, CTA/NEA (Torres) (2000) PERB Decision No. 1386.) Accordingly, your allegation that CTA breached its duty of fair representation when it refused to represent you, fails to state a prima facie case and is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations,² you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Robin W. Wesley
Regional Attorney

Attachment

cc: Priscilla Winslow

Warning Letter

April 22, 2002

Diane M. Kaiser
4572 Gertrude Drive
Fremont, CA 94536

Re: Diane M. Kaiser v. California Teachers Association
Unfair Practice Charge No. SF-CO-607-E
WARNING LETTER

Dear Ms. Kaiser:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 4, 2002. Your charge alleges that the California Teachers Association violated the Educational Employment Relations Act (EERA)¹ by breaching its duty of fair representation.

Your charge states in its entirety:

After the local chapter of the teacher's association (Fremont Unified District Teacher's Association (F.U.D.T.A.)) failed to correct the violations of my contract, I contacted the California Teacher's Association in Burlingame, CA to appoint a representative of my choice. My request was refused. Article 1 and Article 28 provide a unit member has a right/shall be afforded an opportunity to select a representative. Attachments: A, B, C, D, E, F, G, H, I, J.

Attached to the charge are of copies of letters to CTA requesting representation. Also attached are copies of Articles 1 and 28 of the collective bargaining agreement between the Fremont Unified District Teacher's Association and the Fremont Unified School District.

Your charge fails to state a prima facie case.

The Fremont Unified District Teacher's Association was selected by the members of the certificated bargaining unit at the Fremont Unified School District to serve as their exclusive representative to represent the employees in employment matters with the District. As the

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

exclusive representative, the Association has a duty to fairly represent bargaining unit members. In providing additional services and resources to its members, the Association may

affiliate with other organizations such as CTA. However, CTA is not the exclusive representative and it has no obligation to bargain with the District on behalf of the employees, nor does it owe a duty of fair representation to bargaining unit members. (California Teachers Association, CTA/NEA (Torres) (2000) PERB Decision No. 1386.)

Since CTA does not owe you a duty of fair representation, your charge alleging that CTA breached its duty of fair representation when it refused to represent you must be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before May 6, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robin W. Wesley
Regional Attorney